11-14-2001

Third Place: John Ashcroft, et al. v. Free Speech Coalition, et al.

Clay Steward

Amy Chang

THIRD PLACE

Docket No. 00-795

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2001

JOHN ASHCROFT, ATTORNEY GENERAL
OF THE UNITED STATES, ET AL.,
Petitioner,

-against-

THE FREE SPEECH COALITION, ET AL.,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

November 14, 2001
Round #3: 7:45 P.M.

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QUESTIONS PRESENTED

1. Does the First Amendment prevent Congress from enacting a content-based speech restriction that criminalizes non-obscene, sexual depictions of persons who are not real children?

2. Does the CPPA criminalize an intolerable amount of constitutionally protected speech so as to warrant severing those sections that tread impermissibly on First Amendment rights?

3. Are the phrases "appears to be" and "conveys the impression" so vague as to make a person guess about what conduct is prohibited and encourage arbitrary and discriminatory enforcement of the Act?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 198 F.3d 1083 (9th Cir. 1999).

STATUTORY PROVISIONS INVOLVED

The statute relevant to the disposition of this case, 18 U.S.C. § 2256(8)(B), (D) is set forth in Appendix A.

STANDARD OF REVIEW

A challenge to the constitutionality of a federal statute is reviewed de novo. See Crawford v. Lungren, 96 F.3d 380, 384 (9th Cir. 1996).

STATEMENT OF THE CASE

Preliminary Statement

On January 27, 1997, Respondent, The Free Speech Coalition, et al., filed a complaint in the United States District Court for the Northern District of California, seeking declaratory and injunctive relief against Petitioner ("the Government") by a pre-enforcement challenge to § 2256(8)(B) and (D) of the Child Pornography Prevention Act of 1996 ("CPPA"). (J.A. 1.) On August 12, 1997, the district court determined the CPPA constitutional and granted the Government's summary judgment motion. (J.A. 85.) The Free Speech Coalition appealed to the United States Court of Appeals for the Ninth Circuit on August 13, 1997. (J.A. 87.) The Ninth Circuit reversed the decision of the district court, finding that Congress had established no compelling interest served by the content-specific speech restriction and that the Act was both unconstitutionally overbroad and vague. The Free Speech Coalition. v. Reno, 198 F.3d 1083, 1095,1097 (9th Cir. 1999). The Government petitioned the Ninth Circuit for a rehearing en banc, which it denied on July 19, 2000. The Free Speech Coalition v. Reno, 220 F.3d 1113 (9th Cir. 2000). This Court granted the Government's petition for certiorari on January 22, 2001. Holder, et al. v. The Free Speech Coalition 121 S.Ct. 876 (2001).

Statement of the Facts

Over the past twenty five years, Congress has attempted to enact laws to facilitate the prosecution of persons engaged in the creation, distribution, and possession of sexually explicit images made through the exploitation of children. The CPPA expanded upon existing child

pornography laws, largely to combat the use of computer technology to produce artificial, sexual images of individuals that resemble children. (J.A. 30.) The Act criminalized the production of images which "appear to be" or "convey the impression" of minors engaged in sexually explicit conduct. 18 U.S.C. § 2256(8)(B), (D). This statutory language reflected a substantial shift from defining child pornography in terms of actual harm inflicted on child participants to a more comprehensive definition which targeted the perceived negative effects of simulated or fictional child pornography. (J.A. 39.)

Respondent, The Free Speech Coalition, is a trade association of businesses involved in the "production, distribution, sale and presentation of non-obscene, adult-oriented materials." (J.A. 2,3.) Joining the Free Speech Coalition in its facial opposition to sections 2256(8)(B) and (D) of the CPPA are Bold Type, Inc., the publisher of a book "dedicated to the education and expression of the ideals and philosophy associated with nudism;" Jim Gingerich, a New York artist whose paintings include landscapes and large-scale nudes; and Ron Raffaelli, a professional photographer whose works include nude and erotic photographs. (J.A. 3.) The actors and models depicted in Respondents' art are, and always have been, over the age of eighteen. (J.A. 18, 20, 21, 23.) Nonetheless, out of fear of being prosecuted under the CPPA, Respondents have refrained from producing or distributing images that may appear to some members of the adult community to be minors; it is this unguided self-censorship which formed the basis of Respondents' complaint for declaratory and injunctive relief. (J.A. 18, 20, 21, 23.)

SUMMARY OF ARGUMENT

The CPPA criminalizes the production of images which "appear to be" or "convey the impression" of minors engaged in sexually explicit conduct. As such, the Act prohibits a type of expression protected by the First Amendment, namely, sexual, non-obscene depictions of

individuals who are not real children. This Court has excluded child pornography and obscene speech from traditional First Amendment protection. However, the CPPA impermissibly targets non-obscene, childless depictions of both youthful-looking adults and fictional or simulated images that resemble children. Because this Court's rationale for excluding child pornography from First Amendment coverage has been the prevention of the exploitative use of children, Congress is not free to regulate childless pornography based on its content. The justification for placing child pornography outside the ambit of the First Amendment is undermined when no children are utilized in the production of non-obscene, sexual images.

The CPPA is a content-specific statute, as it targets child pornography because of its objectionable content and bans it, thereby chilling an entire category of speech. As a content-specific speech restriction, the Act fails strict scrutiny because it is not narrowly tailored to advance the compelling governmental interest of protecting children from physical and psychological harm. As a complete ban on speech, the Act's scope is not reasonably restricted to an identifiable evil which Congress may legitimately target. Congress is forbidden from regulating a person's thoughts merely because they are perceived as distasteful; the moral judgments of an aggressive legislature, without the support of a legitimate, child-protective rationale, cannot and should not justify the governmental intervention into private impressions.

Because the CPPA prohibits more protected expression than is necessary to prevent the sexually exploitative use of children, it is unconstitutionally overbroad. The Act sweeps within its condemnation speech which the First Amendment has immunized from governmental regulation. The threat of unlawful application of the Act is both real and substantial; numerous artists and producers have refrained from creation and distribution of images which may resemble children because they fear severe criminal sanctions under the CPPA.

Moreover, the CPPA is unconstitutionally vague, violating Fifth Amendment due process rights. The statutory language "appears to be" and "conveys the impression" fails to define the criminal offense with sufficient definiteness that an ordinary person could understand what conduct is prohibited. The language is so vague that both creators and viewers of erotic art will refrain from engaging in lawful activity out of fear that potential criminal liability may hinge on the subjective interpretations of another person. Furthermore, the CPPA encourages arbitrary and discriminatory enforcement. The Act gives law enforcement officials, prosecutors, and juries broad discretion to assign criminal liability based on subjective impressions.

ARGUMENT

I. THE FIRST AMENDMENT PROTECTS NON-OBSCENE, SEXUAL DEPICTIONS OF PERSONS WHO ARE NOT REAL CHILDREN.

The United States Constitution mandates that "Congress shall make no law abridging the freedom of speech." U.S. Const. amend. I. The protection of generally disfavored and often morally objectionable speech is a cardinal principal of the First Amendment; the marketplace of ideas thrives upon the constitutional guarantee of free expression. Although this Court has afforded child pornography limited constitutional protection, by expanding the definition of child pornography to include images which "appear to be" or "convey the impression" of minors engaged in sexually explicit conduct, Congress criminalized a type of expression protected by the First Amendment. 18 U.S.C. § 2256(8)(B), (D). Congress maintains an indisputable interest in punishing those who would physically and psychologically harm children but, by criminalizing the production of images which depict no actual children, Congress has abused the legislative discretion afforded by this Court to regulate child pornography. As a content-based suppression of speech, the Act is not narrowly tailored to advance the compelling governmental interest of preventing the sexually exploitative use of real children. As such, it cannot withstand

strict scrutiny. Therefore, this Court should declare the Act facially violative of the First Amendment, and sever sections 2256(8)(B) and (D), rendering the Act otherwise enforceable.

A. The Act Restricts a Type of Expression Protected by the First Amendment.

With the enactment of the CPPA, Congress sought to establish an entirely new category of unprotected speech; the Act criminalizes the production of non-obscene, sexual depictions of individuals who are not real children. Although child pornography does not enjoy First Amendment protection, sexual images that are neither obscene nor depict actual children should not be subject to this categorical exclusion. The First Amendment recognizes a difference between fictional or "childless," child pornography and actual child pornography. As the Act punishes not only those who would exploit children, but those who are interested merely in the production of sexually-oriented images of persons that resemble minors, it punishes a type of expression that this Court has traditionally afforded First Amendment protection . . . non-obscene, adult pornography.

1. The First Amendment protects "childless," child pornography because its production does not require the exploitative participation of real children.

In N.Y. v. Ferber, 458 U.S. 747, 756-57 (1982), this Court denied child pornography First Amendment protection because of the "State's interest in 'safeguarding the physical and psychological well-being of a minor.'" (quoting Globe Newsp. Co. v. Super. Ct., 457 U.S. 596, 607 (1982)). The New York statute at issue in Ferber prohibited the "*use* of a child in a sexual *performance*." 458 U.S. at 750 (emphasis added). The Court held that statutes criminalizing child pornography must limit the offense to "works that visually depict sexual conduct by children below a specified age." Id. at 764. Because the statute criminalized the "use" of real children in sexual "performances," this Court could be certain that it was upholding a law which was aimed at the "prevention of sexual exploitation and abuse of children." Id. at 757. The

Ferber Court further limited the scope of its decision by recognizing that in situations where "a person over the statutory age who perhaps looked younger" or a "simulation" of a minor was depicted, such images would enjoy constitutional protection. Id. at 763. In order to protect children from the physical and psychological abuse inherent in compelled sexual performance, this Court placed child pornography outside the ambit of First Amendment protection. Nonetheless, as the Ninth Circuit correctly noted, "[n]othing in Ferber can be said to justify the regulation of [child pornography] other than the protection of actual children used in [it's] production." Free Speech Coalition v. Reno, 198 F.3d 1083, 1092 (9th Cir. 1999).

Similarly, in Osborne v. Ohio, 495 U.S. 103, 109 (1990), this Court upheld a statute outlawing the private possession of child pornography because the law was designed "to protect the victims of child pornography" by "destroy[ing] a market for the exploitative use of children." As in Ferber, the statute in Osborne criminalized only pornography featuring real children. Id. at 106-7. In Osborne, this Court justified the exclusion of child pornography from First Amendment protection on the grounds that the statute in question protected child victims from participation in a type of expression that is tantamount to physical and psychological child abuse. Id. at 109. Therefore, the Osborne Court, like the Ferber Court, separated adult and child pornography for purposes of constitutional analysis, affording child pornography no First Amendment protection because its production requires the sexually exploitative use of real children.

Here, the rationale underlying this Court's categorical exclusion of child pornography from First Amendment protection must be revisited, as the CPPA does much more than criminalize the sexual exploitation of actual child participants. By prohibiting the generation of images which merely "appear to be" or "convey the impression" of minors engaged in sexually

explicit conduct, the Act criminalizes a type of expression more akin to childless pornography. The child-protective policy rationale which supported this Court's decisions in Ferber and Osborne is misplaced in the arena of fictional imaging. Sections 2256(8)(B) and (D) are entirely unrelated to the harmful effect of child pornography on child participants but, rather, target the effect of fictional imaging on the viewer. The CPPA does not require that actual children participate in pornographic acts for the depiction of such acts to be criminal; the mere "impression" of minors engaged in sexual conduct renders the viewer criminally liable. When this Court excluded child pornography from First Amendment protection, an entire category of speech was exposed to content-specific prohibition, but the type of childless pornography targeted by the CPPA was not within the contemplation of the Ferber and Osborne courts.

Moreover, the First, Fourth, Fifth, and Eleventh Circuits' holdings that sections 2256(8)(B) and (D) lawfully target unprotected speech is based solely on dicta from this Court's decision in Osborne. U.S. v. Hilton, 167 F.3d 61, 70 (1st Cir. 1999); U.S. v. Fox, 248 F.3d 394, 401 (5th Cir. 2001); U.S. v. Mento, 231 F.3d 912, 918 (4th Cir. 2000); U.S. v. Acheson, 195 F.3d 645, 650 (11th Cir. 1999). In dicta, this Court briefly noted that pervasive regulation of child pornography, in addition to protecting child participants, may be desirable to prevent pedophiles from seducing children into sexual activity. Osborne 495 U.S. at 111. Because, in Osborne, this Court justified its holding under the rationale of protecting the well-being of children, the inclusion of an additional, periphery interest, also supported by that rationale, buttressed the Court's reasoning. Nonetheless, when no actual children are used in the creation of pornography, all that remains is the periphery interest, which itself is not so compelling as to justify the blanket suppression of speech. Petitioner contends that this Court, in Osborne, implicitly approved the regulation of childless pornography, even though the statute in question

only prohibited the nude depiction of actual minors. However, there is nothing in Osborne that suggests that this Court approved, or even contemplated, the prohibition of sexual images that depict no actual children. Therefore, images which "appear to be" or "convey the impression" of minors are not child pornography for purposes of the First Amendment, and thus, should be afforded traditional First Amendment protection.

2. The CPPA bans constitutionally protected, non-obscene, sexual images.

Because the CPPA criminalizes the production and possession of images that cannot be properly categorized as child pornography, the speech prohibited by the phrases "appears to be" and "conveys the impression" is protected by the First Amendment unless it is otherwise obscene. Although this Court has held that "obscenity is not within the area of constitutionally protected speech or press," the CPPA prohibits non-obscene, childless pornography. Roth v. U.S., 354 U.S. 476, 485 (1957). By targeting images which may be wholly artificial, not because they appeal to a prurient interest, but rather because they resemble minors, Congress has criminalized constitutionally protected, non-obscene speech.

This Court has arrived at a three part test for determining whether speech is obscene, and thus undeserving of First Amendment protection. The three factors to be considered are 1) whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; 2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and 3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. Miller v Cal., 413 U.S. 15, 24 (1973). Moreover, both offensiveness and an appeal to something other than "normal, healthy sexual desires" are essential elements of obscene speech. Brockett v. Spokane Arcades, Inc., 472 U.S. 491. Specifically, this Court has held that prurience may be

constitutionally defined for the purposes of identifying obscenity as that which appeals to a "shameful or morbid interest in sex." Roth, 354 U.S. at 487.

The CPPA impermissibly restricts protected speech because it extends to non-obscene, sexual expression. By criminalizing the production and possession of images which "appear to be" minors engaged in sexually explicit conduct, Congress has not only undermined the child-protective policy rationales of Ferber and Osborne, but deviated from the constitutionally established obscenity standard. The CPPA prohibits speech which is neither patently offensive nor appeals to a "shameful or morbid interest in sex." Roth, 354 U.S. at 487. Moreover, the CPPA reaches material which may possess literary, artistic, political, or scientific value. Therefore, the blanket prohibition of childless pornography cannot be justified on the grounds that such speech is per se obscene.

B. The Act is a Content-Based Restriction on Speech.

"Any restriction on speech, the application of which turns on the content of the speech, is a content-based restriction, regardless of the motivation that lies behind it." Boos v. Barry, 485 U.S. 312, 335-36 (1988). Content-based regulations of speech are "presumptively invalid." R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992). A law is only content-neutral if it applies to all speech regardless of the message; content-neutral speech restrictions are those that are "justified without reference to the content of the regulated speech." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). If a law is directed at the impact of the speech on its viewers, it cannot be evaluated as a neutral time, place, or manner restriction. See Reno v. ACLU, 521 U.S. 844, 868 (1997). This Court has been reluctant to recognize the constitutional validity of content-based speech restrictions because content discrimination "raises the specter that the

Government may effectively drive certain ideas or viewpoints out of the marketplace." R.A.V., 505 U.S. at 387 (internal citations omitted).

1. The CPPA restricts child pornography solely on the basis of its objectionable content.

The CPPA is a content-based restriction on speech, as it is the content of an image of a minor, or one who "appears to be a minor" engaged in sexual conduct which makes the production of that image unlawful. "The CPPA is a quintessential content-specific statute," because it "expressly aims to curb a particular category of expression by singling out that type of expression based on its content and banning it." Hilton, 167 F.3d at 68-69. Moreover, the legislative history of the CPPA clearly demonstrates that one of Congress' principal motivations in enacting the statue was to regulate the effect child pornography has on its viewers. Congress was concerned that child pornography "whet[s] [the] appetites" and "inflames the desires" of its viewers. S. Rep 104-358 Sec. II (4),(10)(B). Furthermore, the enactment of the CPPA was supported by the notion that child pornography "poisons the minds and spirits of our youth . . . and debases our society as a whole." Id. at Sec. IV (A); see also Sec. IV (B) (commenting that "a major part of the threat to children posed by child pornography is its effect on the viewers of such material"). Therefore, as the Act targets and restricts expression based solely on the perceived danger of its content, the CPPA is properly scrutinized as a content-based speech restriction.

2. The CPPA does not target the "secondary effects" of speech, but rather unreasonably anticipates the impact of its content.

Moreover, the "secondary effects doctrine" does not render the Act content-neutral. Although this Court has recognized otherwise content-based statutes as content neutral when those laws are motivated by a desire to control the secondary effects of speech, this doctrine has

been interpreted narrowly by this Court, and is therefore inapplicable to the facts of the present case. In Renton v. Playtime Theaters, Inc., 475 U.S. 41, 48 (1986), this Court held that an apparently content-specific statute could be analyzed as content-neutral if it was "justified without reference to the content of the regulated speech." In Renton, the regulation at issue was a city ordinance which, although applying only to a particular category of speech, adult movie theaters, was aimed at the secondary effects of such theaters. The ordinance was directed at the prevention of crime, maintenance of property values, and protection of residential neighborhoods. As this Court later stated in Boos, "the ordinance in Renton did not aim at the suppression of free speech," as the "content of the films being shown inside the theaters was irrelevant and was not the target of the regulation." 485 U.S. at 320. This Court, in Boos, concluded that "listeners' reactions to speech are not the type of 'secondary effects' we referred to in Renton." Id. at 321.

Here, the effects that Congress was trying to eradicate were not irrelevant to the speech itself, but rather part and parcel of its objectionable content. Although the CPPA reflects Congress' concern with the incidental effects of child pornography, these effects cannot properly be categorized as "secondary," for they are the anticipated effects of the speech's dangerous content. For example, the Act is not targeted at pedophilia itself, but rather at speech which, depending on a viewer's reaction to such material, may or may not facilitate future sexual abuse. The CPPA was intended to prevent the perceived moral, social, and psychological damage inflicted by child pornography, thus, the objectionable content cannot be deemed irrelevant to a more secondary Congressional purpose. The CPPA is not a neutral time, place, or manner restriction, but rather the blanket suppression of an entire category of speech; the speech

restriction was motivated by the perceived negative impact of the speech, thus the secondary effects doctrine does not apply.

Finally, this Court has stated that even if an area of speech, such as child pornography, can be regulated because of its constitutionally proscribable content, it does not mean that these areas are "entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content." R.A.V., 505 U.S. at 383-84. Therefore, childless pornography should not be subject to the Court's categorical exclusion of child pornography from First Amendment protection, as its "content" is not "distinctively proscribable." What makes the content of child pornography proscribable is the exploitative use of children. When no real children are depicted, the content can no longer be freely regulated, and the general presumption against content-based speech restrictions intervenes. Therefore, given the content-specific nature of the CPPA, this Court should apply strict scrutiny in its facial analysis of the Act.

C. The CPPA Does Not Survive Strict Scrutiny.

A content-based restriction on speech is subject to strict scrutiny review. Ward, 491 U.S. at 791. This Court uses "the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." Turner Broad. Sys. v. FCC, 512 U.S. 622, 623 (1994). As such, a content-based speech restriction is presumptively invalid unless it is narrowly tailored to serve a compelling governmental interest. Boos, 485 U.S. at 321. Because the CPPA is not narrowly tailored to advance the compelling governmental interest of preventing the sexually exploitative use of real children in the generation of pornographic images, it does not survive strict scrutiny.

1. The prohibition of sexually explicit images which do not depict actual children is not a compelling governmental interest.

a. This Court has identified the prevention of harm to child participants as the underlying legislative interest in criminalizing child pornography.

The Ferber Court expressly stated that "depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection." 458 U.S. at 764-65. Thus, Congress is not free to place content-specific speech restrictions upon the production of images which do not feature actual child "performances," or direct child participation. Furthermore, the Ferber Court's rationale for prohibiting child pornography rested firmly upon the identifiable legislative interest in protecting children from the physical and psychological damage inherent in sexual exploitation. Similarly, this Court, in Osborne, sought to protect "child victims," under the rationale that "child pornographers permanently record the victim's abuse." 495 U.S. at 111. Thus, this Court has consistently upheld the pervasive regulation of child pornography in support of the justifiable state interest in protecting real children from tangible and immediate harm.

b. Regulating the sexual appetites of pedophiles is not a compelling justification for criminalizing the production of images which do not depict actual children.

The CPPA criminalizes the anticipated sexual responses of those who view simulated or fabricated, childless pornography. The Government contends that sexually explicit photos of persons who "appear" to be children could be used by pedophiles to lure potential victims. This assertion is neither supported by sufficient legislative findings, nor justified under a strict scrutiny test. As there is no established nexus between the viewing of fabricated images of child pornography and acts of sexual abuse committed by the viewer, the criminalization of such images is not supported by a compelling governmental interest.

One of the justifications advanced by Congress for its prohibition of sexual images which "appear" to depict children is that the statute will "prevent pedophiles from using these images to seduce children into sexual activity, and will prevent sex crimes against children." S. Rep 104-358 Sec. IV(B). Congress' concern that fabricated pornographic images will act as a "training manual" or "device" for pedophiles in breaking down the "resistance and inhibitions of their victims" is not a compelling reason for regulating speech itself, especially as the speech does not encourage criminal exploitation of children. This Court has held that even speech which advocates criminal conduct deserves First Amendment protection provided that the encouragement does not rise to the level of incitement. Brandenburg v. Ohio, 395 U.S. 444, 448-49 (1969). Furthermore, the criminalization of speech which does not involve an actual human victim in its presentation targets a process of mental intermediation which Congress is not authorized to regulate. Although childless child pornography could conceivably be used by pedophiles to lure victims, the fact that speech may be later used as an instrument for criminal activity does not justify a blanket restriction of the speech itself. For example, visual depictions of violence could be used by criminals to coerce the participation of others in a criminal enterprise, yet the images themselves are not inherently criminal.

c. The eradication of images which are morally or aesthetically objectionable is not a compelling justification for the CPPA's blanket speech restriction.

The First Amendment protects individuals from government intrusion into their private thoughts and impressions. Stanley v. Ga., 394 U.S. 557, 559 (1969). "[I]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his house, what books he may read or what films he may watch." Id. Moreover, the government "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."

Stanley, 394 U.S. at 566. Although this Court, in its post- Stanley decisions, has refused to extend First Amendment protection to child pornography, it has deliberately avoided overruling Stanley, and thus the rule forbidding governmental regulation of private impressions is fundamentally sound. See Ferber, 458 U.S. at 763.

The provisions of the Act which criminalize the production of images "which appear to be" or "convey the impression" of minors engaged in sexually explicit conduct violate the rule advanced in Stanley. By extending the definition of child pornography to include non-obscene, childless pornography, Congress, rather than protecting children, has attempted to legislate morality. The contested provisions of the CPPA are targeted at the eradication of "evil ideas" and, as such, do not advance the government interest which was the justification for this Court's rulings in Ferber and Osborne. These provisions do not protect child victims, but rather infiltrate the mental processes of the artist and the viewer. The mental impressions and sexual desires of those who create and view non-obscene, adult pornography are protected by the First Amendment. In evaluating the Congressional motivations underlying the enactment of the CPPA, this Court should continue its "longstanding refusal to [punish speech] because the speech in question may have an adverse emotional impact on the audience." Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 55 (1988).

2. The Act is not narrowly-tailored to advance the compelling governmental interest of preventing the exploitative use of actual children in pornographic displays.

To satisfy the standards of strict scrutiny, a content-based restriction on speech such as the CPPA must not only advance a compelling governmental interest, but must also be narrowly tailored to attain that end. In the present case, to survive strict scrutiny, The CPPA's criminalization of images which "appear to be" or "convey the impression" of minors engaged in

sexually explicit conduct, must be the least restrictive means of furthering the government's interest in combating the harms generated by child pornography. See Sable Commun. of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989). Although legislatures are "entitled to greater leeway in the regulation of pornographic depictions of children," by criminalizing sexual depictions of persons who are not children, Congress has exposed the CPPA to the exacting standards of strict judicial scrutiny. Ferber, 458 U.S. at 756. Because the prohibition of images which "appear to be" or "convey the impression" of minors engaged in sexually explicit conduct is not the least restrictive means of preventing the physical and psychological abuse of children, or destroying a market which capitalizes on such abuse, the CPPA does not survive strict scrutiny.

In Sable, this Court held that a statute's "denial of adult access to telephone messages which are indecent but not obscene far exceeds that which is necessary to limit the access of minors to such messages . . . [and thus] does not survive constitutional scrutiny." 492 U.S. at 131. The Sable Court warned that the statute in question was a quintessential example of "burn[ing] the house to roast the pig." Id. (quoting Butler v. Mich., 352 U.S. 380, 383 (1957)). The statute was a "complete ban" and, thus, not the least restrictive means of protecting children from indecent telephone communications. Id. Although Congress maintains a compelling interest in "protecting the physical and psychological well-being of minors," the statute in Sable was "not reasonably restricted to the evil with which it [was] said to deal." Id. at 126-27.

Here, sections 2256 (8)(A), (D) are not narrowly tailored to advance the compelling governmental interest of protecting children from sexual exploitation and corruption. Therefore, as in Sable, the Act is a "complete ban" and, thus not reasonably restricted to proscribable expression. As the Ninth Circuit correctly observed, the CPPA criminalizes the production and possession of "foul figments of creative technology that do not involve any human victim in their

creation or in their presentation." Free Speech, 198 F.3d at 1093. The Act is not narrowly drawn to advance the compelling governmental interest of preventing the sexual abuse of child participants, as a person who "appears to be" a minor may not even be an actual human being; fictional persons, as well as young-looking adults are per se incapable of being victims of child, sexual abuse. In its attempt to destroy the child pornography market and facilitate prosecutions, Congress has cast its net too widely, capturing a substantial amount of constitutionally protected speech.

II. THE CPPA IS UNCONSTITUTIONALLY OVERBROAD AS IT PROHIBITS BOTH UNPROTECTED CHILD PORNOGRAPHY AND PROTECTED, NON-OBSCENE DEPICTIONS OF PERSONS WHO ARE NOT REAL CHILDREN.

When a statute reaches so far as to include constitutionally protected speech, it violates the First Amendment. Grayned v. City of Rockford, 408 U.S. 104, 114 (1972). The CPPA is precisely such a statute because it is a complete ban of both protected and unprotected speech. More specifically, the Act prohibits both traditional child pornography and non-obscene depictions of individuals who are not real children. Because the Act criminalizes the production of images which "appear to be" or "convey the impression" of minors engaged in sexually explicit conduct, it impermissibly expands the scope of the CPPA to the extent that it captures so much protected speech as to render the Act unconstitutional. The totality of constitutionally impermissible applications of the Act justifies severing sections 2256(8)(B) and (D), so as to prevent protected speech from being eclipsed by the unlawful sweep of an otherwise legitimate statute.

A. The CPPA Prohibits An Intolerable Amount of Constitutionally Protected Speech.

A statute is overbroad when it restricts an extensive amount of constitutionally protected speech. Hoffman Ests. v. The Flipside, Hoffman Ests., 455 U.S. 489, 494 (1982). To be

unconstitutional, a statute's overbreadth "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Broadrick v. Okla., 413 U.S. 601, 613 (1973). This Court has defined substantial overbreadth as "a realistic danger that the statute will significantly compromise recognized First Amendment protections of parties not before the Court." Members of the City Council of the City of L.A. v. Taxpayers for Vincent 466 U.S. 789, 801 (1984).

The CPPA "criminalizes an intolerable range of constitutionally protected conduct," and is therefore substantially overbroad. Osborne, 495 U.S. at 112. The Act punishes non-obscene, childless pornography that portrays youthful-looking adults and computer generated images of persons resembling minors, as well as realistic paintings, drawings, sculptures, and cartoons. As such, there is a "substantial danger" that the Act will "significantly compromise" First Amendment rights, as it prohibits images which are neither obscene nor involve the sexual exploitation of children.

1. The CPPA bans valuable speech.

In Reno v. ACLU, 521 U.S. 844, 877 (1997), this Court held that the Communications Decency Act of 1996 (CDA) was overbroad because the terms "indecent" and "patently offensive" included large amounts of non-pornographic material that had serious educational or other kinds of value. This Court found that the Government was unable to carry the heavy burden of proving that no material of social value would be covered by the CDA. Id. at 879.

Here, the terms "appears to be" and "conveys the impression" implicate vast amounts of non-pornographic material that has serious literary, artistic, political, or scientific value. Under the CPPA, an erotic painting by the famed Balthus that depicts a child in what some may perceive to be a sexually explicit pose violates the CPPA. Similarly, acclaimed films, such as

KIDS, Traffic, and "O", which contain scenes that depict simulated sexual intercourse between actors portraying minors would fall within the broad sweep of the criminal statute. The Act's reach likewise extends to a medical textbook that portrays and discusses the sexual abuse of children.

2. Individuals exercising their right to free speech are currently being restricted by the CPPA.

The Government erroneously analogizes the CPPA to the New York statute held to be constitutional in Ferber. 458 U.S. at 773. Ferber and this case are inapposite because the CPPA has and will continue to restrict far more types of protected expression than the statute at issue in Ferber. There are legal forms of artistic expression currently covered under the Act that are being affected. Outlaw Productions, Inc., for example, an adult film company, has withheld adult films featuring adults who appear to be younger than 18 because they fear prosecution under the Act. (J.A. 17.) Bold Type, Inc., a group that educates people who are interested in nudism, fear prosecution for teaching people about the freeing aspects of the nudist philosophy. (J.A. 3.) Jim Gingerich, a well-known artist whose paintings include landscapes and large-scale nudes, fears the possibility of being prosecuted for a painting that portrays an adult who appears to be younger than 18. (J.A. 3.) Outlaw Productions, Bold Type, and Jim Gingerich, are only a few examples of people who are covered under the overly broad scope of the CPPA. Under the Act, a person who publishes a book about nudism will be placed in the same category as a person who sexually exploits children.

Congress voiced concerns that the overly broad language of the CPPA would include people who exercise the very rights that have been previously expressly protected. Senator Biden, for example, cautioned that "by criminalizing all visual depictions that "appear to be" child pornography - even if no child is ever used or harmed in its production - [the CPPA]

prohibits the very type of depictions that the Supreme Court has explicitly held protected." (J.A. 52.) Senator Biden's concern has become a reality because constitutionally protected speech is being punished under the CPPA.

B. The CPPA's Severability Clause Provides an Alternative to Finding the Entire Statute Invalid on Overbreadth Grounds.

Although this Court has traditionally been reluctant to strike down a statute on its face when the statute "marginally infringes on First Amendment values," this Court has held that partial invalidation of a statute is appropriate when a statute is part constitutional and part unconstitutional. Parker v. Levy, 417 U.S. 733, 760 (1974); Brockett v. Spokane Arcades, 472 U.S. 491, 501 (1985). "If the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected." Id.

The CPPA contains a severability clause, which was specifically included to remedy the overbreadth that may result from Sections 2256(8)(B) and 2256)(8)(D). 18 U.S.C. 2256(9); S. Rep. No. 104-358 at 28 (1996). Congress foresaw the potential unconstitutional overbreadth of the CPPA and included the severability clause in order to provide this Court with a less severe alternative to complete invalidation.

The unconstitutional sections of the CPPA and the constitutional sections are wholly independent of each other and this Court should utilize the severability clause and strike Sections 2256(8)(B) and (D). These sections transform an otherwise lawful statute into an unconstitutional statute because they include images that do not depict actual children. By striking these two sections, this Court will cure the CPPA of its constitutional infirmities and enable it to serve the compelling governmental interest of protecting real children from sexual exploitation.

III. THE CPPA IS VOID FOR VAGUENESS AS THE PHRASES "APPEARS TO BE" AND "CONVEYS THE IMPRESSION" ARE HIGHLY SUBJECTIVE.

The Constitution provides that "no person shall . . . be deprived of life, liberty, or property without due process of law." U.S. Const. amend. V. The CPPA is void for vagueness because it violates the Fifth Amendment right to due process. Statutory vagueness is unconstitutional because vague laws: 1) do not specify what type of conduct is unlawful such that a person of ordinary intelligence can understand; 2) result in "arbitrary and discriminatory application"; and 3) have a chilling effect on the exercise of protected speech. Grayned v. City of Rockford, 408 U.S. 104,108-109 (1972). Sections 2256(8)(B) and (D) exemplify each of these concerns.

A. The CPPA Does Not Define the Criminal Offense with Sufficient Clarity Such That an Ordinary Person Could Understand What Is Prohibited.

A statute that forces persons of common intelligence to guess at its meaning violates the constitutional guarantee of due process. Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926). The phrases "appears to be" and "conveys the impression" are highly subjective and provide no guidance as to what type of conduct should be avoided so as not to fall under the scope of the CPPA. Moreover, the Government has broad discretion to determine whether an individual's impressions are criminal.

1. The CPPA does not indicate whose perspective defines the appearance of a minor.

The phrases "appears to be" and "conveys the impression" are highly subjective because they do not specify from whose perspective the impressions are judged. An individual who is looking at an image has no way of knowing whether the illegality of his conduct will be determined solely on the basis of his own impressions or rather from the perspective of the distributor, or even that of law enforcement officials. Similarly, it is difficult to distinguish a

significant difference between the terms "appears to be" and "conveys the impression." For example, it is unclear whether an image can be found to "appear to be a minor" even if it is not presented in such a way as to "convey the impression" that it is a minor. A criminal statute cannot rest on an uncertain foundation that leaves the threshold of what is lawful and unlawful to mere conjecture. Connally, 269 U.S. at 393. A citizen should not be held criminally liable under a statute which is subject to significantly different constructions. Id.

2. Because of its vague wording, the CPPA targets more than apparently realistic depictions of minors.

The government contends that "appears to be" and "conveys the impression" addresses real children. However, the language of the statute does not specifically state that it addresses minors. Therefore, the CPPA does not limit its applications to realistic images of children. Under the current construction of the statute, any image that a single individual decides to interpret as a child is included under the statute. Therefore, each citizen is judged according to the extremes of society's interpretations, from the most conservative to the most liberal.

B. The Vague Statutory Language Encourages Arbitrary and Discriminatory Enforcement.

In Kolender v. Lawson, this Court held that the possibility of law enforcement officials employing their personal beliefs poses a grave threat that must be prevented. There must be clear standards of application in order to prevent police, prosecutors, and juries from subjectively enforcing the law according to their discretion. 461 U.S. 352, 358 (1983). The CPPA lacks these clear standards of application and the phrases "appears to be" and "conveys the impression," give law enforcement officials the opportunity to subjectively exercise their discretion. No formula can accurately calculate the relationship between the actual age of a

person and the age that a person "appears to be." Therefore, the CPPA permits the "arbitrary and discriminatory enforcement" that this Court warned about in Kolender.

1. The reach of the CPPA is not limited to sexually explicit images that are "virtually indistinguishable" from real children.

In the legislative history of the CPPA, Congress addressed the possibility that certain types of technology could be used to create images that are "virtually indistinguishable" from authentic photographs of actual minors engaging in such conduct. (J.A. 31.) Although such Congressional concerns may have motivated the enactment of the CPPA, Petitioner erroneously contends that Congress set a standard by which the fact-finder could determine whether an image falls within the scope of the statute. (J.A. 31.) The standard used by juries is not the "virtually distinguishable" standard and Petitioner has misconstrued the legislative history. Congress was merely addressing the role of computer technology and the potential for production of realistic computer images. However, the language of the statute encompasses both computer images as well as all non-computer generated images

Even assuming that the government's contention is valid and that juries will use a "virtually indistinguishable" standard to determine whether an individual has violated the CPPA, such a standard is still highly subjective. The phrase "virtually indistinguishable" would allow juries to arbitrarily and discriminatorily enforce the statute because juries are subject to the same influences as law enforcement. The various personalities and backgrounds of the jury members will result in unexpected determinations of whether the image is "virtually indistinguishable" from that of an actual child.

2. The scienter requirement does not remedy the violation of an individual's due process rights.

The government erroneously contends that the CPPA's scienter requirement saves the statute because it forces the government to prove that the individual acquired or distributed the child pornography because he believed that the sexual images were of children under 18 years old. However, the scienter requirement does not rectify the violation of an individual's due process rights and permits the government to invade the individual's privacy. Due Process rights cannot be remedied after the fact and the government will also be permitted to conduct an unfettered investigation of backgrounds and past histories.

3. The affirmative defense is inadequate.

The affirmative defense is inadequate because it is unavailable to those charged with possession and only sellers, producers, and distributors are able to use this affirmative defense. Therefore, an individual who possesses lawful adult pornography may be convicted of possession of child pornography because the affirmative defense is unavailable. Petitioner contends that 18 U.S.C. § 2252(A)(d) provides a defense for those who are charged with possession of child pornography. [1] However, this defense is likewise inadequate for three reasons.

First, the defense only protects those who possessed less than three images and does not specify the way in which the images must have come into possession. Therefore, an individual who receives four e-mails containing images that "appear to be" or "convey the impression" of minors engaging in sexually explicit conduct will be convicted of possession.

[1] 18 U.S.C. § 2252A(d) states than an individual may avoid conviction by demonstrating that he (1) possessed fewer than three such images; and (2) promptly and in good faith destroyed or reported the images to law enforcement.

Second, because the defense forces individuals to promptly and in good faith destroy the images but does not define what "promptly" means, an individual who is unaware that he has come into possession of images covered under the CPPA may be convicted for possession.

Third, requiring individuals to report the images to law enforcement places a heavy burden on civilians to run the risk that they will be unjustly branded as a viewer of child pornography.

Furthermore, the government's contention that the scienter requirement and affirmative defense save the statute ignores the fact that due process right are triggered prior to prosecution. The exhaustive ordeal and negative stigma of an innocent person being known as a viewer of child pornography is too great and is not fixed by an affirmative defense that is triggered after the fact. The statute also provides no guarantees that the problem will be fixed. The Constitution requires that individuals be provided adequate warning and notice of what action will violate certain laws. Because the CPPA's only safeguards are offered after an individual's due process rights have been violated, it violates the Constitution.

C. The CPPA Has a Chilling Effect on Constitutionally Protected Speech.

The right to free speech is supremely precious. NAACP v. Button, 371 U.S. 415, 433 (1963). In Button, this Court addressed the strong possibility that vague laws will prevent people from exercising their right to free speech. Id. The threat of punishment is enough to frighten people into surrendering their First Amendment rights. Id. at 433. When boundaries of forbidden areas are not clearly defined, citizens err on the side of caution and sacrifice lawfully permitted forms of free speech. Grayned v. City of Rockford, 408 U.S. 104, 109 (1972). In Reno v. ACLU, this Court held that the Communications Decency Act was void for vagueness because the sanctions were too extreme. 521 U.S. at 871. The CDA was a criminal statute and

had a penalty of two years in jail. 521 U.S. at 872. Fear of invoking such criminal sanctions would prevent individuals from communicating lawful ideas and images. Id.

The CPPA's criminal sanctions are far more severe than those of the CDA. Conviction under the CPPA is a minimum of fifteen years in prison. Thus, the chilling effect discussed in Reno is magnified in this case because the stakes are higher. The minimum fifteen year penalty will prevent large numbers of people from exercising their Constitutional right to free speech. Those who risk criminal sanctions in order to speak freely must defend their ideas under the affirmative defense.

The CPPA's affirmative defense contravenes the Congressional intent of the First Amendment because it forces people to utilize their own resources. Individuals must hire lawyers and fight a legal battle in order to employ the affirmative defense. The CPPA forces individuals to satisfy a prerequisite before they can exercise their First Amendment rights. By doing so, the CPPA changes the First Amendment and limits its freedoms to a select few. Under the CPPA, only those who possess and are able to use their own resources are permitted to exercise their First Amendment rights. Because only certain individuals are given the right to speak freely, the marketplace of ideas is robbed of valuable contents.

CONCLUSION

By criminalizing the sexual depiction of adult or even artificial persons which "appear to be" or "convey the impression" of minors engaged in sexually explicit conduct, Congress has legislated in contravention of the First Amendment. No children are harmed in the production or possession of childless pornography, and thus the child-protective policy rationale underlying the Ferber and Osborne decisions has been significantly undermined. Therefore, Congress is prevented from enacting a content-based speech restriction upon non-obscene, childless

pornography unless the Act is narrowly tailored to advance a compelling governmental interest. Because the CPPA is not narrowly tailored to advance the compelling governmental interest of protecting children from physical and psychological harm, it does not survive strict scrutiny.

Furthermore, the CPPA is invalid on overbreadth grounds because it prohibits an intolerable amount of constitutionally protected speech. Because the scope of the Act is so expansive, a substantial amount of valuable speech will be deterred. Therefore, this Court should sever the offending provisions of the Act so as to tailor the CPPA to the identified social need of preventing the exploitative use of real children.

Moreover, the CPPA is void for vagueness because it fails to define the prohibited conduct such that a person of common intelligence can understand and encourages law enforcement to arbitrarily and discriminatorily enforce the statute. The imprecise definition of and relationship between the phrases "appears to be" and "conveys the impression" exposes the Act to opposing constructions and subjective fact-finding.

For the foregoing reasons, Respondent respectfully requests that this Court AFFIRM the decision of the United States Court of Appeals for the Ninth Circuit and find Sections 2256(8)(B) and (D) of the CPPA unconstitutional.

Respectfully submitted,

Counsel for Respondent

APPENDIX A

18 U.S.C. § 2256(8) defines child pornography as:

Any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where –

(B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;

(D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.